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Ang Pok Hong & Anor v Public Prosecutor

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HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–120–09 OF 2016
MOHAMAD SHARIFF JC
14 AUGUST 2017

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Constitutional Law — Constitution — Contravention of — Whether questions posed attracted constitutional issues — Whether arts 7, 8, 5 and 13 of the Federal Constitution contravened — Whether same issue or question decided in Lei Lin Thai v Public Prosecutor — Federal Constitution arts 5, 7, 8 & 13 — Courts of Judicature Act 1964 s 30 — Capital Market and Services Act 2007 ss 188(2)(a) & 201(5)

D

The first applicant was charged with four charges of insider trading offences under s 188(2)(a) of the Capital Market and Services Act 2007 ('the Act') and the second applicant was charged with three charges for abetting the first applicant in committing the alleged offences under s 370(c) read together with s 188(2)(a) of the Act. The applicants had applied to the sessions court to stay the proceedings at the sessions court based on the Federal Court decision of *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265. The matter before the court was to decide on the merit of the application pursuant to a referral from the sessions court under s 30 of the Court of Judicature Act 1964. The issues for consideration were: (a) whether questions posed attracted constitutional issues from the sessions courts proceedings; (b) whether arts 7, 8, 5 and 13 of the Federal Constitution were contravened; and (c) whether the same issue or question was already decided in the case of *Lei Lin Thai v Public Prosecutor* [2016] 9 MLJ 631.

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Held, ordering stay of sessions court proceeding pending Federal Court decision:

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(1) The questions posed would attract constitutional issues as they involved articles of the Federal Constitution. The ultimate question was whether the decision of the Federal Court necessary for the determination of proceeding (see para 23).

I

(2) The additional 'civil penalty' of up to RM1m that could be claimed by the securities commission pursuant to s 201(5) against the same offenders charged under s 188(2) tantamount to a 'greater punishment'. The provisions of both ss 188(2) and (4) and 201(5) of the Act arose for

consideration by the Federal Court in the present s 30 of the Courts of Judicature Act 1964 and was necessary for the determination of the proceeding (see paras 26–27).

(3) In the context of art 8 of the Federal Constitution, which prohibits 'excessive' or 'unfair' state and executive actions, it would appear to be worthy of reference to the Federal Court, once and for all, for the Federal Court's consideration and handing down of guidelines to deal with future challenges. The decision of the Federal Court would be necessary to determine the charges against the applicants in the sessions court (see para 30).

(4) The respondent had set out the various acts of the applicants in acquiring the shares which occurred on different dates and involving different amounts of shares. These distinctions pointed to the fact that the acts were distinct and complied with s 163 of the Criminal Procedure Code (see para 33).

(5) Every single act of the appellant in acquiring the shares while in possession of material non-public information would stand separately as separate and complete offences. These could not be regarded as one single offence. The four charges against the first appellant and the three charges against the second appellant were in accordance with the law and they were not excessive. The issue of 'doctrine of proportionality' did not arise (see para 35).

(6) The decision of learned judicial commissioner in *Lei Lin Thai* was overruled as the Court of Appeal had allowed the applicant's appeal against the High Court decision and reverted to the High Court for further consideration. *Lei Lin Thai*'s case was not applicable in the current application. The questions posed by the applicants were constitutional issues which have yet to be determined by the Federal Court (see para 37).

[Bahasa Malaysia summary

Pemohon pertama dituduh dengan empat tuduhan kesalahan perdagangan dalaman di bawah s 188(2)(a) Akta Pasaran Modal dan Perkhidmatan 2007 ('Akta') dan pemohon kedua dituduh dengan tiga tuduhan kerana bersubahat dengan pemohon pertama dalam melakukan kesalahan-kesalahan yang didakwa di bawah s 370(c) dibaca bersama dengan s 188(2)(a) Akta. Pemohon-pemohon telah memohon kepada mahkamah sesyen untuk menangguhkan prosiding di mahkamah sesyen berdasarkan keputusan Mahkamah Persekutuan dalam kes *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265. Perkara di hadapan mahkamah untuk diputuskan adalah atas merit permohonan berikutan kepada rujukan daripada mahkamah sesyen di bawah s 30 Akta Mahkamah Kehakiman 1964. Isu-isu untuk pertimbangan adalah: (a) sama ada soalan-soalan yang dikemukakan menarik isu-isu perlembagaan

daripada prosiding mahkamah sesyen; (b) sama ada perkara 7, 8, 5 dan 13 Perlembagaan Persekutuan dilanggar; dan (c) sama ada isu atau soalan yang sama telah diputuskan di dalam kes *Lei Lin Thai v Public Prosecutor* [2016] 9 MLJ 631.

Diputuskan, memerintah penangguhan prosiding mahkamah sesyen sementara menunggu keputusan Mahkamah Persekutuan:

(1) Soalan yang dikemukakan akan menarik isu-isu perlembagaan kerana ia melibatkan perkara-perkara Perlembagaan Persekutuan. Soalan utama adalah sama ada keputusan Mahkamah Persekutuan perlu untuk penentuan prosiding (lihat perenggan 23).

(2) Tambahan 'civil penalty' hingga kepada RM1 juta boleh dituntut oleh suruhanjaya sekuriti berikutan s 201(5) terhadap pesalah-pesalah yang sama yang dituduh di bawah s 188(2) merupakan kepada 'greater punishment'. Peruntukan kedua-dua ss 188(2) dan (4) dan 201(5) Akta berbangkit untuk pertimbangan oleh Mahkamah Persekutuan dalam kehadiran s 30 Akta Mahkamah Kehakiman 1964 dan adalah perlu untuk penentuan terhadap prosiding (lihat perenggan 26–27).

(3) Dalam konteks perkara 8 Perlembagaan Persekutuan, yang mana melarang 'excessive' atau 'unfair' tindakan-tindakan negeri dan eksekutif, ia nampaknya patut merujuk kepada Mahkamah Persekutuan, akhirnya, untuk pertimbangan Mahkamah Persekutuan dan menurunkan garis panduan-garis panduan untuk menangani cabaran-cabaran masa hadapan. Keputusan Mahkamah Persekutuan adalah perlu untuk menentukan tuduhan-tuduhan terhadap pemohon-pemohon di mahkamah sesyen (lihat perenggan 30).

(4) Responden telah mengemukakan pelbagai tindakan pemohon-pemohon dalam memperolehi saham-saham tersebut yang berlakuk pada tarikh-tarikh berlainan dan melibatkan jumah berbeza saham-saham. Perbezaan in menunjukkan fakta bahawa tindakan-tindakan itu adalah berbeza dan mematuhi s 163 of the Kanun Keseksaan (lihat perenggan 33).

(5) Setiap tindakan perayu dalam memperolehi saham-saham semasa memiliki maklumat bukan awam material akan berdiri berasingan sebagai kesalahan-kesalahan berasingan dan lengkap. Ini tidak boleh dianggap sebagai satu kesalahan. Keempat-empat tuduhan terhadap perayu pertama dan ketiga-tiga tuduhan terhadap perayu kedua adalah mengikut undang-undang dan tidak berlebihan. Isu 'doctrine of proportionality' tidak berbangkit (lihat perenggan 35).

(6) Keputusan pesuruhjaya kehakiman yang bijaksana dalam kes *Lei Lin Thai* ditolak memandangkan Mahkamah Rayuan telah membenarkan rayuan pemohon-pemohon terhadap keputusan Mahkamah Tinggi dan

berbalik kepada Mahkamah Tinggi untuk pertimbangan selanjutnya. Kes *Lei Lin Thai* tidak beraplikasi dalam permohonan ini. Soalan-soalan yang dikemukakan oleh pemohon-pemohon adalah isu-isu perlembagaan yang mana belum ditentukan oleh Mahkamah Persekutuan (lihat perenggan 37).]

Notes

For cases on constitution in general, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2345–2499.

Cases referred to

Gan Boon Aun v PP [2016] 4 MLJ 265, FC (refd)
Lei Lin Thai v PP [2016] 9 MLJ 631, HC (refd)
Leken @ Delem ak Gerik (M) v PP [2007] 3 MLJ 730; [2007] 8 CLJ 158, HC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
Mohd Hanafi Ramly v PP [2012] 2 CLJ 326 (refd)
Nooralina binti Mohd Shah & Anor v Pendakwa Raya [2017] MLJU 181; [2017] 2 AMR 701, HC (refd)
Peter Tham Wing Fai v PP [1988] 2 MLJ 424 (refd)

Legislation referred to

Capital Market and Services Act 2007 ss 188, 188(2), (2)(a), (4), (5), (6), 201, 201(1), (2), (3), (4), (5), (5)(a), (5)(b), (5)(A), (5)(B), (8), (9), 205, 205(5), 370(c)
Rules of the Federal Court 1995 rr 31, 32, 33
Courts of Judicature Act 1964, ss 30, 30(1), 84, 84(4), 85
Criminal Procedure Code s 163
Federal Constitution arts 5(1), 7, 8, 13(1), 128
Penal Code s 467
Securities Industry Act 1983 ss 89E(2), (4), 90, 90A, 90A(5)

Ng Aik Guan (Ng Aik Guan & Co) for the first and second applicants.
Hashley Tajudin (Ros Mawar with him) (Deputy Public Prosecutor, Attorney General's Chamber); Karl Nadzarin (Prosecuting Officer, Securities Commission) for the respondent.

Mohamad Shariff JC:

PREAMBLE

[1] On 5 February 2015, the first applicant (Ang Pok Hong), was charged in the Kuala Lumpur Sessions Court with four charges of insider trading offences under s 188(2)(a) of the Capital Market and Services Act 2007 ('the CMSA') and the second applicant (Wendy Wong Soon Soon) was charged with

three charges for abetting the first applicant in committing the alleged offences above under s 370(c) read together with s 188(2)(a) of the CMSA.

[2] Both the first and second applicant claimed trial in respect of the charges proferred against them. The charges against them are as follows:

Charges against First Applicant (Ang Pok Hong)

(i) That you on 22 September 2008 at Bursa Malaysia Securities Berhad (Company No 635998-W), Exchange Square, Bukit Kewangan 50200 Kuala Lumpur in the Federal Territory, *acquired 50,000 unit of TH Group Berhad (Company No 183467-X) shares (the said shares)* through your Central Depository System account number 087-001-027550524 *while in possession of information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said shares,* such information being the proposed privatization of TH Group Berhad via a Selective Capital Repayment exercise and you ought reasonably to have known such information was not generally available and you have thereby *committed an offence under Section 188(2)(a) of the Capital Markets & Services Act 2007 (Act 671) and punishable under Section 188(4) of the same Act.*

Punishment: shall be punished, on conviction, to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.

(ii) That you on 23 September 2008 at Bursa Malaysia Securities Berhad (Company No 635998-W), Exchange Square, Bukit Kewangan 50200 Kuala Lumpur in the Federal Territory, *acquired 100,000 unit of TH Group Berhad (Company No 183467-X) shares (the said shares)* through Wendy Wong Soon Soon's (NRIC No 750427-12-5308) Central Depository System account bearing number 087-001-048257885 *while in possession of information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said shares,* such information being the proposed privatization of TH Group Berhad via a Selective Capital Repayment exercise and you ought reasonably to have known such information was not generally available and you have thereby *committed an offence under Section 188(2)(a) of the Capital Markets & Services Act 2007 (Act 671) and punishable under Section 188(4) of the same Act.*

Punishment: shall be punished, on conviction, to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.

(iii) That you on 24 September 2008 at Bursa Malaysia Securities Berhad (Company No 635998-W), Exchange Square, Bukit Kewangan 50200 Kuala Lumpur in the Federal Territory, *acquired 38,000 unit of TH Group Berhad (Company No 183467-X) shares (the said shares)* through Wendy Wong Soon Soon's (NRIC No 750427-12-5308) Central Depository System account bearing number 087-001-048257885 *while in possession of information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said shares,* such information being the proposed privatization of TH Group Berhad via a Selective Capital Repayment exercise and you ought reasonably to have known

such information was not generally available and you have thereby *committed an offence under Section 188(2)(a) of the Capital Markets & Services Act 2007 (Act 671) and punishable under Section 188(4) of the same Act.*

Punishment: shall be punished, on conviction, to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.

(iv) That you on 25 September 2008 at Bursa Malaysia Securities Berhad (Company No 635998-W), Exchange Square, Bukit Kewangan 50200 Kuala Lumpur in the Federal Territory, *acquired 16,000 unit of TH Group Berhad (Company No 183467-X) shares (the said shares)* through Wendy Wong Soon Soon's (NRIC No 750427-12-5308) Central Depository System account bearing number 087-001-048257885 *while in possession of information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said shares,* such information being the proposed privatization of TH Group Berhad via a Selective Capital Repayment exercise and you ought reasonably to have known such information was not generally available and you have thereby *committed an offence under Section 188(2)(a) of the Capital Markets & Services Act 2007 (Act 671) and punishable under Section 188(4) of the same Act.*

Punishment: shall be punished, on conviction, to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.

Charges against Second Applicant (Wendy Wong Soon Soon)

(i) That on 23 September 2008 at Bursa Malaysia Securities Berhad (Company No 635998-W), Exchange Square, Bukit Kewangan 50200 Kuala Lumpur in the Federal Territory, Ang Pok Hong (NRIC No 640911-12-5062) *acquired 100,000 unit of TH Group Berhad (Company No 183467-X) shares (the said shares)* through your Central Depository System account number 087-001-048257885 *while she was in possession of information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said shares,* such information being the proposed privatization of TH Group Berhad via a Selective Capital Repayment exercise and she ought reasonably to have known such information was not generally available and thereby committed an offence under Section 188(2)(a) of the Capital Markets & Services Act 2007 (Act 671) and that you had *abetted Ang Pok Hong in the commission of that offence, which offence was committed in consequence of your abetment and that you have thereby committed an offence under Section 370(c) of the Capital Markets & Services Act 2007 (Act 671) and punishable under Section 188(4) of the same Act.*

Punishment: shall be punished, on conviction, to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.

(ii) That on 24 September 2008 at Bursa Malaysia Securities Berhad (Company No 635998-W), Exchange Square, Bukit Kewangan 50200 Kuala Lumpur in the Federal Territory, Ang Pok Hong (NRIC No 640911-12-5062) *acquired 38,000 unit of TH Group Berhad (Company No 183467-X) shares (the said shares)* through your Central Depository System account number 087-001-048257885 *while she was in possession of information that was not generally available which on*

becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said shares, such information being the proposed privatization of TH Group Berhad via a Selective Capital Repayment exercise and she ought reasonably to have known such information was not generally available and thereby committed an offence under Section 188(2)(a) of the Capital Markets & Services Act 2007 (Act 671) and *that you had abetted Ang Pok Hong in the commission of that offence, which offence was committed in consequence of your abetment and that you have thereby committed an offence under Section 370(c) of the Capital Markets & Services Act 2007 (Act 671) and punishable under Section 188(4) of the same Act.*

Punishment: shall be punished, on conviction, to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.

(iii) That on 25 September 2008 at Bursa Malaysia Securities Berhad (Company No 635998-W), Exchange Square, Bukit Kewangan 50200 Kuala Lumpur in the Federal Territory, Ang Pok Hong (NRIC No 640911-12-5062) *acquired 16,000 unit of TH Group Berhad (Company No 183467-X) shares (the said shares)* through your Central Depository System account number 087-001-048257885 *while she was in possession of information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said shares, such information being the proposed privatization of TH Group Berhad via a Selective Capital Repayment exercise and she ought reasonably to have known such information was not generally available and thereby committed an offence under Section 188(2)(a) of the Capital Markets & Services Act 2007 (Act 671) and that you had abetted Ang Pok Hong in the commission of that offence, which offence was committed in consequence of your abetment and that you have thereby committed an offence under Section 370(c) of the Capital Markets & Services Act 2007 (Act 671) and punishable under Section 188(4) of the same Act.*

Punishment: shall be punished, on conviction, to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.

[3] On 10 March 2015 both applicants made an application to the High Court to strike out the charges and asked for a stay of the criminal proceedings. On 27 May 2015, the High Court found no merits in both applications and dismissed them.

[4] On 4 June 2015 the applicants filed their appeal to the Court of Appeal.

[5] On 24 February 2016 the Court of Appeal posed the question on whether it proper/premature for them to hear this matter. Trial at the sessions court was fixed for 10, 11 and 12 May 2016.

[6] Meanwhile back to the sessions court on 10 May 2016, the applicants then made another attempt by forwarding an application to the sessions court to stay the trial adducing several questions the applicants argued to be

A constitutional under s 30 of the Courts of Judicature Act 1964 to the High Court.

B **[7]** On 11 May 2016 the Court of Appeal struck out their appeal and declared that it was premature and not appealable. The Court of Appeal also refused to consider the request for stay of the criminal trial at the sessions court.

C **[8]** On 12 May 2016, the sessions court decided to refer the application under s 30 of the Courts of Judicature Act to the High Court (this application) but refused to grant a stay. Trial proceeded with seven prosecution witnesses adducing evidence.

D **[9]** On 26 October 2015, when trial was to be continued, the applicants made a further application to the sessions court to stay the proceedings at the sessions court based on the Federal Court decision in *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265. The sessions court then allowed the stay application. So at the moment the criminal prosecution is at a halt.

E **[10]** The questions framed by the applicants were as follows:

(a) whether s 188(2) of the CMSA violates arts 5, 7, 8 and/or 13 of the Federal Constitution?

F (b) whether the very existence of 2 procedures under ss 188(2) and 201(5) of the CMSA 2007 which allows the public prosecutor and the Securities Commission (SC) to choose under which procedure to proceed against potential accused persons renders the more drastic and unfavourable procedure under s 188(2) of the CMSA 2007 unconstitutional in violation of arts 5, 7, 8 and/or 13 of the Federal Constitution?

G (c) whether the very co-existence and operation of the provisions of s 188(2) and (4) and s 201(5)(a) and (b) and sub-ss 201(8) and (9) violates arts 5, 7, 8 and/ or 13 of the Federal Constitution?

H (d) whether in charging accused person under s 188(2) of the CMSA 2007 and further leaving open the option of instituting civil action under s 201(5) of the CMSA against the very same accused persons violates Article 7 of the Federal Constitution?

(e) whether in preferring multiples charges against the accused persons under s 188(2) of the CMSA in respect of the same usage/possession of the very same alleged material non-publicly available information violates arts 5, 7, 8 and/or 13 of the Federal Constitution?

I (f) whether the actions of the Public Prosecutor and the Securities Commission in electing to charge both the accused persons under s 188 of the CMSA instead of proceeding against them by way of civil action pursuant to s 201(5) CMSA violates arts 5, 7, 8 and/or 13 of the Federal Constitution?

[11] The matter is now before this court pursuant to a referral from the sessions court under s 30 of the Courts of Judicature Act 1964 to decide on the merit of this application. The public prosecutor (the respondent) on the other hand had opposed such application in which the Federal Court in the case of *Gan Boon Aun*'s had decided that the jurisdiction to decide on constitutional issues raised under s 30 of the Courts of Judicature Act 1964 is only vested upon the Federal Court but *the High Court must properly ensure that there is merit in such application before deciding to transmit the records to the Federal Court.*

THE APPLICANT'S COUNSEL SUBMISSION

[12] The applicants are alleging that the existence of s 201(5)(A) and (B) of the the CMSA have the effect of inflicting or subjecting a person who contravene s 188(2) of the same Act, to a 'greater punishment' than they would already suffer under s 188(4) of the same Act. The applicants had argued that by virtue of s 201(5) of the CMSA, which they may be subjected to amount to 'greater punishment'. The applicants are alleging that a civil penalty of up to RM1m together with 'an amount equal to three times the amount being difference ...' which may be imposed and claimed under that provision is an additional course of action which would subject the same accused to a greater punishment.

[13] It is the applicants' contention that the actions of the Securities Commission Malaysia ('SC') in preferring civil actions against some and recommending for criminal charges against others for offences of insider trading is unfair and/or arbitrary discrimination. The applicants had 'feel aggrieved and prejudiced' as they were charged in court instead of 'the less serious process of civil action'. The applicants' contention that as there is no guideline as to the class of cases in which either procedure is to be resorted to (ss 188 or 201 of the CMSA) in a given situation, thus they are being discriminated.

[14] The applicants also submitted that the charges against them are arbitrary and excessive under the 'doctrine of proportionality'. The applicants argued that that there should only be one single charge each against each respective applicant instead of the current four against the first applicant and three against the second applicant because there was actually only one 'distinct offence' regardless of on how many occasions the shares were bought since all of them relate back to the same possession/usage of the same information.

[15] On the final argument, the counsel for the applicants' has submitted that the multiple charges approach (instead of one single charge) against the

applicants' exposes them to 'unconciounably excessive and exorbitant' fines and is thus a wrongful deprivation of property. They argued that the cumulative effect of s 188(2) and (4) and s 201(5)(a) and (b) of the CMSA results in an unfairness and arbitrariness which when read together with s 201(8) and (9) of the CMSA, unjustly enriches the Securities Commission.

THE DPP'S SUBMISSION

[16] The DPP submitted that there has not been any action taken against the applicants under s 201(5) of the CMSA. Therefore, the applicants' alleged constitutional question in relation to this is academic not based on any factual matrix and premature as the applicants have not shown in what way their constitutional rights have been adversely affected or taken away from them with the charges against them in this case. The DPP further submitted that that the applicants' counsel had misinterpreted the meaning of 'greater punishment' and also a premature argument as s 201(5) of the CMSA had not been activated.

[17] The learned DPP had submitted a mere feeling of grievance or prejudice does not amount to an infringement of a constitutional right. As the insider trading provisions in the CMSA apply alike on all persons who have committed a breach of the law, the issue of discrimination does not arise. All persons who are in breach of the law would face the possibility of a civil action under s 201 of the CMSA or a criminal action under s 188(4) of the same Act or even both. As the law apply to all persons who are in breach of the law, such law cannot be regarded as discriminatory. The learned DPP further argued that there is a clear criteria set out in the CMSA itself, that the Commission would need to consider it to be in the public interest to take civil actions to recover the sums set out in sub-ss (5) or (6) accordingly. As to the quantum that can be recovered by the Securities Commission, this is also set out in the provision itself, ie *three times the difference between the price at which the securities were acquired, and the price at which they would have been likely to have acquired if the information had been generally available*. Furthermore, the guideline as to which procedure is to be resorted to can be inferred from the law itself.

[18] The DPP had argued that for the determination of the issue raised by the applicants', it is important to examine the elements of the offence as defined under s 188(2) of the CMSA. The proscribed conduct is that either acquiring or disposing the said shares while being in possession of material non-public information. In the charges against the applicants', the prosecution has set out the various acts of acquiring the shares which occurred on different dates, involving different amounts of shares and involving different amounts, all of which point to the fact that these acts are distinct and hence in compliance with s 163 of the Criminal Procedure Code.

[19] In addition, the procedures under ss 89E(4), 90 and 90A cannot be said to exist side by side as the powers are exercised by two different parties. As such it cannot contravenes the Federal Constitution.

[20] Finally the DPP argued that the charges that were filed against the applicants' are legally valid and the impugned provisions of the CMSA were in fact enacted by Parliament after going through its own due process. Thus, any property of the applicants' that would be deprived as a result of a conviction on those charges or as a result of the said provisions of the CMSA would be made in accordance with law.

ISSUES FOR DETERMINATION OF THE COURT

Based on the written submission by both parties, the issue to be determined by this court namely:

First issue: Whether there are questions of constitutional issue arising from the proceedings in the session's court?

[21] Before I could proceed to consider the merit of such application, I could remind myself that the matter is now before this court as a result of the decision in the case of *Gan Boon Aun v Public Prosecutor*. The Federal Court in that case, posted a question of whether the High Court, upon a constitutional issue being referred to it by the subordinate court, by virtue of s 30(1) of the Courts of Judicature Act, was correct in deciding on the constitutional issue and answering the questions referred to it. The learned Zulkefli CJ (as he then was) in delivering the judgment of the Federal Court had stated the following:

> ... it is to stated here that nowhere in *ss 30 and 84 of the CJA is power given to the High Court judge to determine which concerns the effect of a provision of the constitution which had arisen in the subordinate court and in respect of which the record of proceedings have been transmitted to the High Court by the subordinate court under s 30 of the CJA. That power belongs to the Federal Court* ...

Section 30(1) of the Courts of Judicature Act 1964 (Act 91) provides as follows:

> (1) Where in any proceedings in any subordinate court *any question arises as to the effect of any provision of the Constitution* the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court.
>
> (2) Any record of proceedings transmitted to the High Court under this Section *shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings* he shall deal with the case in accordance with section 84 as if it were a case before him

in the original jurisdiction of the High Court in which the question had arisen.

[22] In *Gan Boon Aun*'s case, though it was decided that the High Court had no jurisdiction to determine the constitutional question, but the Federal Court in its interpretation of s 30 of the Courts of Judicature Act 1964 had also decided as follows at p 277:

> ... we would take the view that under s 30 of the CJA High Court judge has to consider and decide *whether there is a question of constitutional issue on matters referred to it by the Sessions Court necessary for the determination of the proceedings before the Sessions Court ...*
>
> ...
>
> We would like to state here and advise all sessions court judges and magistrates when dealing with any application made by any party under s 30 of the CJA to properly ensure that there is merit in such application. It may be just a frivolous application to delay the conduct of the hearing of the trial. If there is no merit in such application the case should proceed to a final conclusion basis without interruption and delay. A trial should not be by instalment. *Likewise, the High Court judges when presiding to deal with matters brought before them under s 30 of the CJA should act and decide promptly and judiciously whether there is merit in such application. If the matter referred to it does not relate to constitutional issue to be determined by the Federal Court, it should be sent back to the transmitting court for speedy disposal of the case ...*
>
> *If there is none the High Court judge must send the case back for continued hearing before the sessions court.* On the other hand, *if the High Court finds that a decision is necessary for the determination of the proceedings in the sessions court, it is the duty of the High Court judge under s 84 to state the question* which in the opinion of the High Court judge had arisen as to the effect of the provision of the Constitution in the form of a special case which shall permit of an answer being given in the affirmative or the negative. Once that is done, the High court judge shall *transmit the special case to the Federal Court* in accordance with the Rules of the Federal Court ...

[23] Having considered the above authority at length and by referring to s 30 of the Courts of Judicature Act 1964, to my mind, this court shall first consider and decide whether there is a question of constitutional issue on the matters being referred to by the sessions court under s 30 of the said Act. In other words, the questions shall not be automatically be referred to the Federal Court without this court first consider and decide whether there is a question of constitutional issue with regards to the questions raised by both the applicant at para 10 above. A careful examination of the history behind the present case against both the applicants will show that there was a plea bargaining conducted with the participation of the previous trial sessions judge that culminated in a non successful outcome but the prosecution can confirm that one of the rejected plea bargain *proposal made by the applicants was to have the*

subject matter resolved under the alternative civil settlement procedure set out under s 201(5) of the CMSA 2007 and the present prosecutions discontinued under s 188 of the CMSA 2007. Not only was that alternative proposal rejected but *the prosecution persisted with the present prosecutions and kept open their option to prefer, in future, the civil settlement proceedings under s 201(5) of the CMSA 2007 as an additional recourse.* It has become the applicants grievance concerning the alternative treatment under s 201(5) extended to other transgressors and offenders under s 188 of the CMSA in the court below during the same application. As such, the provisions of s 205 of the CMSA 2007 have arisen for consideration in the instant case and will be relevant in the matrix of facts to be considered in the present s 30 of the Courts of Judicature Act 1964. On a plain language and wording *it is my considered view that the questions posed would attract some constitutional issues as they involve articles of the Federal Constitution*. Having considered that questions posed are constitutional issues, the ultimate question would be: *Is the decision of the Federal Court's necessary for the determination of the proceeding?*

It is to be noted that the questions posed have never been considered by the Federal Court. Neither such arguments were made in that court and finally decided.

Second issue: Whether it contravenes art 7 of the Federal Constitution is it necessary for the determination of the proceeding?

[24] Before I could conclude this issue, it is best to quote art 7 of the Federal Constitution as follows:

> 7(1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and *no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.*
>
> (2) A person who has acquitted or convicted of an offence shall not be tried again for the same offence

It is trite law that no person can be made to 'suffer greater punishment' as already prescribed, in this case, under s 188(4) for the alleged contravention of s 188(2) as set out in all the charges againt the accused person:

> 188 Prohibited conduct of person in possession of inside information
>
> (1) ...
>
> (2) An insider shall not, whether as principal or agent, in respect of any securities to which information in subsection (1) relates —
>
> (a) acquire or dispose of, or enter into agreement for or with a view to the acquisition or disposal of such securities; or

(b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a viewto the acquisition or disposal of such securities.

(3) ...

(4) *A person who contravenes subsection (2) or (3) commits an offence and shall be punished on conviction to imprisonment for a term not exceeding ten years and to a fine of not less than one million ringgit.*

(5) ...

201 Recovery of loss or damages

(1) ...

(4) ...

(5) where:

(a) *an insider —*

(i) acquired or agreed to acquire securities; or

(ii) *procured any person to acquire or agree to acquire securities in contravention of subsection 188(2);* or

(b) an insider communicated information referred to in subsection 188(1) to another person, in contravention of subsection 188(3),

any such securities were permitted to be traded on a stick market of a stock exchange, then, *whether or not the insider had been charged with an offence in respect of the contravention had been proved in a prosecution, the Commission may, if the Commission considers that it is in the public interest to do so, by civil action, take any or both of the following actions, against the insider:*

(A) Recover an amount equal to three times the amount being the difference between the price at which the securities were acquired or agreed to be acquired, by the insider or the other person, and the price at which they would have been likely to have been acquired at the time of the acquisition or agreement, as the case may be, if the information had been generally available;

(B) Claim civil penalty in such amount as the court considers appropriate having regard to the seriousness of the contravention, being an amount not more than one million ringgit

[25] A separate provision in form of s 201(5) of the CMSA 2007 *provides for yet an additional course of action albeit thinly disguised as a purported 'civil action'* to be taken by the Securities Commission in respect of the very same accused person. This 'additional' and having the effect of inflicting or subjecting the very same accused person to a 'greater punishment' than he would otherwise have already been liable to or would suffer under s 188(4) since s 201(5) purports to allow the Securities Commission to punish them a second time with the 'greater punishment' provided in s 201(5)(a) and (b) of the CMSA 2007 *regardless 'whether or not the insider or any other person involved in the*

contravention has been charged with an offence in respect of the contravention'.

[26] A purported remedy/penalty which the Securities Commission is empowered to recover by way of 'civil action' under s 201(5) and (b) would show that they are, in truth and in substance, actually 'greater punishment' since the 'up to 3 times difference in prices' provision in sub-para 201(5)(a) is 'punitive' in nature when compared to the rationale of normal recoverable civil loss or damages suffered by the 'victim' which civil recources, in any event, are already provided under sub-ss 201(1) to 201(4) and do not have the '3-times multiplier penalty or punitive effect' as in sub-s 201(5)(a). Furthermore, *the additional purported 'civil penalty' of up to RM1m which the Securities Commission can claim pursuant to s 201(5) against the very same offenders charged under s 188(2) clearly tantamount to a 'greater punishment'.*

[27] No matter how one views the provisions of s 188(2) and (4) and s 201(5) of the CMSA 2007, *the overall or cumulative effect is that persons who are alleged to be incontravention of s 188(2) can be charged in a criminal case and made to suffer the punishment under s 188(4) addition, the very same accused persons can again also be subject to the 'greater punishment' under and in s 201(5)(a) and (b) by way of additional purported 'civil action' by the Securities Commission.* That being so, *to my mind, the provisons of both s 188(2) and (4) and s 201(5) of the CMSA 2007 have arisen for consideration by the Federal Court in the present s 30 of the Courts of Judicature Act 1964 and is necessary for the determination of the proceeding.* It is precisely because of the lack or precedents and the novelty of this issue that calls for a reference of this High Court to frame the question by way of case-stated for the final determination of the Federal Court so that clear guidance can be given to the lower courts on this grey area and unchartered territory.

Third issue: Whether it contravenes art 8 of the Federal Constitution is it necessary for the determination of the proceeding?

[28] The provisions of s 201(5) of the CMSA 2007 and the action of the Securities Commission in preferring or opting to only bring *'civil action' against some other persons in other insider trading cases which involved the contravention of the same s 188(2) under the CMSA 2007 and not to recommend and prefer criminal charges thereunder as compared to the Securities Commission decision instead recommend and prefer criminal charges* against the present applicant wouls tentamount to unfair and/ or arbitrary discrimination. Having that in mind, art 8 of the Federal Constitution provides that:

> All persons are equal before the law and entitiled to the equal protection of the law.

[29] In coming to the conclusion, I would want to quote my earlier

judgment in the case of *Nooralina binti Mohd Shah & Anor v Pendakwa Raya* [2017] MLJU 181; [2017] 2 AMR 701 as follows:

> ... Based on the above provision, any person who contravened s 89E(2) of the Securities Industry Act 1983 would be liable either to be charged under s 89E(4) of the Securities Industry Act or that civil action could be taken under s 90A(5) of the Securities Industry Act. *To my mind, the charges that were preferred against both the Applicant would likelihood faced two different type of punishment, one under s 89E(4) and the other under s 90A(5) of the Securities Industry Act*. Having that in mind, Article 8 of the Federal Constitution provides that:
>
> > All persons are equal before the law and entitiled to the equal protection of the law
>
> ... Counsel for the First Applicant had submitted the Indian case in *Ram Dial v The State of Punjab* AIR 1965 SC 1518 at p 1520, the question which came before the Supreme Court of India for deliberation concerned whether s 14(e) of the Punjab Municipalities Act was void as it had violated Article 14 of the Constitution of India —
>
> > ... therefore, there are two provisions in the Act for removal of a member in the public interest, one contained in Section 14(e) and the other in Section 16. Where the State Government takes action under Section 16(1), it has to give hearing in terms of the proviso thereof to the member concerned, but if for exactly the same reason the State Government chooses to take action under Section 14 it need not give any opportunity to the member to show cause why he should not be removed ...
> >
> > ... In consequence there are two provisions in the Act for removing a member, one contained in Section 16 where the State Government cannot remove the member without giving him a hearing in the manner in the proviso, and the other in Section 14(e) where no hearing is to be given and the member is not even called upon to show cause ...
> >
> > ... Thus, there is no doubt that *Section 14(e) which entirely covers Section 16(1) and unlike Section 16(1) makes no provision for even calling upon the member it is clear that for the same reasons, the State Government may take action under Section 16(1) in which case it will have to give notice to the member concerned and take his explaination as provided in the proviso to Section 16(1), on the other hand it may choose to take action under Section 14(e) in which case it need not give any notice to the member and ask for an explaination from him. This is obviously discriminatory* and, therefore, this part of Section 14(e) must be struk down as it hit by Article 14 of the Constitution ...
>
> ... In the instant case, any person who are dealt with separately under s 89E(4) and s 90A(5) of the Securities Industry Act have common characteristics in that they have been alleged to have contravened s 89E(2) of the Securities Industry Act and therefore, entitled to equal treatment and protection of the law.
>
> ... Having had two different punishment for the same offence committed, *this court found there is no guideline implicit or express anywhere in the Securities Industry Act to indicate as to the class of individual s 89E(4) or s 90A(5) of the Securities Industry Act is to be resorted to in a given situation.* This court would want to refer to the case of:

Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155 (FC), Suffian LP had concluded that:

> ... where there are two procedure existing side, the one that is more drastic and prejudicial *is unconstitutional if there is in law no guideline as to the class of cases in which either procedure is to be resorted ...*
>
> ... Having examined the above provision, *to my mind, any person could be penalised or even punished either under s 89E(4) or s 90A(5) of the Securities Industry Act* as the earlier is more drastic and severe as compared to the latter. As such, to my mind, *a decision of the Federal Court on the First Question is necessary for the determination of the charges against both the Applicant in the Sessions Court ...*

[30] Having examined the above provision, *to my mind, in the context of art 8 of the Federal Constitution which essentially prohibits 'excessive' or 'unfair' state and executive actions in all its manifestations, especially in the form of multiples charges based on the same alleged single culpable blame — worthiness and also the excessive multiple terms of imprisonments and mandatory multiple fines (minimum amount of RM1m per charge) plus the possibility of being crippled further with civil claims involving three times multiples of perceived gains and a civil penalty of up to RM1m against each accused. As such, it would appear to be worthy of reference to the Federal Court, once and for all, for their consideration and handing down of guidelines to deal with any other such future challenges.* As such, to my mind, a decision of the Federal Court is necessary for the determination of the charges against both the applicant in the sessions court.

Fourth issue: Whether it contravene arts 5 and 13 of the Federal Constitution is it necessary for the determination of the proceeding?

Article 5(1) of the Federal Constitution reads as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law

Article 13(1) of the Federal Constitution reads as follows:

> No person shall be deprived of property save in accordance with law

[31] The applicant's counsel had submitted that the charges against them are arbitrary and excessive under the 'doctrine of proportionality'. The counsel had argued that in his submission that there should only be one single charge each against each respective applicant instead of the current four against the first applicant and three against the second applicant because there was actually only one 'distinct offence' regardless of on how many occasions the shares were bought since all of them relate back to the same possession and usage of the same information. Simultaneously, the counsel had also argued that the

multiple charges approach (instead of one single charge) against both the applicants emposes them to 'unconciounably excessive and exorbitant' fines and is thus a wrongful deprivation of property. The cumulative effect of s 188(2) and (4) and s 201(5)(a) and (b) of the CMSA results in an unfairness and arbitrariness which when read together with s 201(8) and (9) of the CMSA, unjustly enriches the Securities Commission.

[32] With regard to the fundamental principles which operates in relation to the charges, it is best to look at s 163 of the Criminal Procedure Code which states:

> 163 Separate charges for distinct offences
>
> For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 164, 165, 166 and 170.

In the case of *Mohd Hanafi Ramly v Public Prosecutor* [2012] 2 CLJ 326, the court held as follows:

> ... firstly, *the section requires that for every 1 distinct offence there has to be a separate charge*. This first rule embodies the rule against duplicity which is a prohibition against the lumping or incorporating of more than one offence in a single charge. The object of this rule is to give the accused notice of the precise accusation in writing which he has to face at the trial. For instance if one charge states two offences, he cannot know for which of the two offences he is to be prosecuted. The risk of confusion of issues may also embarrass the accused in is defence. Furthermore, the accused may be prevented on a future occasion from pleading autrefois convict. *The second general rule requires that every charge be tried separately*, except in the cases mentioned in section 164, 165, 166 and 170 of CPC. This general rule incorporates the rule against misjoinder of charges. The underlying idea behind this rule is that if too many charges are grouped together against an accused person he might be handicapped or embarrassed in conducting his defence ...

Similarly in the case of *Leken @ Delem ak Gerik (M) v Public Prosecutor* [2007] 3 MLJ 730; [2007] 8 CLJ 158, the court held that:

> ... the appellant contended that the offences were all part of a single transaction and were not distinct offences for the purpose of sentencing. The appellant also appealed against the sentences imposed. The court, inter alia, stated that *'distinct' means not identical. The court asserted that the offence which were not inter-related would be distinct, but inter-related offences could also be distinct; it would depend upon the circumstances whether there was only one transaction and one offence committed. Further, the court stated that a series of offences of the same or a similar character could also be distinct, as could offences committed in the same transaction ...*

[33] Having examined the principles of law, it has now come before me for the determination of the issue raised by the applicant's counsel. In examining the element of offence as defined under s 188(2) of the CMSA 2007, the proscribed conduct is that either acquiring or disposing the said shares while

being in possession of material non-public information. In the charges against both the applicants, *to my mind the respondent has set out the various acts of acquiring the shares which occurred on different dates, involving different amounts of shares and involving different amounts, all of which point to the fact that these acts are distinct and hence in compliance with* s 163 of the Criminal Procedure Code. To this effect, I would want to refer to the case of *Peter Tham Wing Fai v Public Prosecutor* [1988] 2 MLJ 424, the appellant there was charged with 36 charges for forging documents which purported to be valuable securities, an offence under s 467 of the Penal Code. The appellant argued that all the offences were all part of a single transaction and were not distinct offences for purposes of sentencing. However, the court rejected the argument stating clearly as follows:

> ... the question arises as to what is meant by 'every distinct offence' in s 167 of the Criminal Procedure Code (similar to our 163 CPC), 'Distinct' menas 'not identical'. Two offences would be distinct if they are not in any way inter-related but if there is some inter-relation it would depend on the circumstances of the case in which the offenceswere committed whether there is only one transaction and only oneoffence was committed ...
>
> *The forgery of each document, although completed within seconds of the next to be forged, was a separate act from the others and never depended on the completion of the others before being complete in itself. The only connection between the forgeries was the proximity in time and a continuity of purpose that, at most, would qualify them as offences committed within the 'same transaction'* ...
>
> ... the appellant in this case forged 18 separate share certifcates, individually numbered, as well as 18 corresponding 'blank transfers' on two occasions. *The forging of each share certificate and each transfer form stands separately by themselves as separate and completed offences with same punishments.* The precise number of forgeries committed do not represent the component parts of any one offence. Each of the forgeries stands by itself ...

[34] Similarly, in the case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, the court is duty bound to give effect to the law as enacted legitimately and properly through the will of the people. The court held that:

> ... the question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. *Our courts ought not to enter this political ticket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution ...*

[35] *Based on the above, to my mind it is evident that every act of acquiring the shares while in possession of material non-public information stands separately by itself as a separate and complete offence and cannot therefore be regarded as merely one offence. The four charges preferred against the first appellant and three charges against the second appellant are in accordance with law and they are not arbitrary*

or excessive. As such, the issue of 'doctrine of proportionality' does not arise and the application on this issue be dismissed.

Final issue: Whether the same issue or question has been decided in the case of Lei Lin Thai v Public Prosecutor [2016] 9 MLJ 631*?*

[36] The learned deputy public procecutor had argued that in *Lei Lin Thai*'s case, the application was not made under s 30 of the Courts of Judicature Act, but by way of a notice of motion, moving the High Court to strike out the charges and to discharge and acquit the applicant of all the charges. The grounds to strike out all the charges were that, namely:

(a) the charges against the applicant contravened art 8 of the Federal Constitution;

(b) the charges were defective and illegal both in substance and form; and

(c) the charges were oppressive, vexatious and an abuse of the judicial and legal process.

[37] In this case, *Lei Lin Thai* who was charged with 53 charges under s 188 of the CMSA argued that pursuant to s 188(2) of the CMSA (similar provision as s 89E(2) of the SIA), two individuals could face different sets of punishment, ie s 188 itself and s 205(5) of the CMSA (similar provision as s 90A(5) of the SIA), and that the two different procedures for punishing the same class of individuals are clearly arbitrary and discriminatory in nature. They argued that s 188 is void as it hit by art 8 of the Federal Constitution. The High Court after hearing submissions from both parties decided to dismiss the application and decided that s 188(2) of the CMSA was constitutional and does not contravene art 8 of the Federal Constitution. The decision went on appeal to the Court of Appeal and on 8 June 2016, the Court of Appeal dismissed the appeal on the basis that the matter was not appealable. Be that as it may, upon scrutinised the *Lei Lin Thai*'s case, to my mind the reasons upon which the learned judicial commissioner concluded that the impugned provisions were constitutional were almost identical. The learned judicial commissioner had considered the constitutional issues despite the fact that under the law, the High Court does not have the power or duty to determine a constitutional question. The learned deputy had reiterated the point that the case of *Lei Lin Thai*'s was not by way of a s 30 Courts of Judicature Act. However, the constitutionality questions answered by the High Court is still valid as the case of *Gan Boon Aun* only affects cases which falls under s 30 of the Courts of Judicature Act. *With respect, it is my considered view that as the Court of Appeal has allowed the applicant's appeal against the High Court decision and revert back to this court for further consideration, the decision of the learned judicial commissioner in Lei Lin Thai's on the constitutional issue is overruled by implication. To this effect, I concluded that the Lei Lin Thai's case has non applicable in this application. Furthermore to my*

mind, the questions posed by the applicants in this case are Constitutional Issues that have not been considered by the Federal Court pursuant to ss 30 and 84 of the Courts of Judicature Act.

[38] Finally in *Gan Boon Aun*'s case, the Federal Court held that:

> ... we are of the view that the literal approach of interpretation should be adopted for the provisions of ss 30 and 84 of the CJA where it is clear that *the power or duty of the High Court judge is confined to considering whether the decision as the effect of a provision of the constitution is necessary for the determination of proceedings in the subordinate court* and to state the question which in his or her opinion has arisen as to the effect of the provision of the constitution in the form of a special case which so far as may be possible shall state the question in a form which shall permit of an answer being given in the affirmative or the negative and *transmitting the same to the Federal Court for determination* ...

TRANSMISSION OF SPECIAL CASE TO THE FEDERAL COURT

[39] In the upshot, based on the above reasons set above and by virtue of the Federal Court's case in *Gan Boon Aun*, I am satisfied that there are merits in the various constitutional arguments raised and obliged to refer the following questions as special case-stated to the Federal Court pursuant to ss 84(4) and 85 of the Courts of Judicature Act read together with rr 31–33 of the Rules of the Federal Court 1995 and art 128 of the Federal Constitution. The fact that there is presently a dearth of precedents or decided cases directly on the issues raised here illustrates the novelty of the issues at hand and the precise need for this honourable court to special case-state to the Federal Court for its determination so that there can be new precedent to guide the lower courts. The questions are as follows:

(1) whether in *charging accused person* under s 188(2) of the CMSA 2007 and further *leaving open the option of instituting civil action* under s 201(5) of the CMSA against the very same accused persons violates art 7 of the Federal Constitution?

(2) whether the actions of the public prosecutor and the Securities Commission *in electing to charge both the accused persons under* s 188 of the CMSA *instead of proceeding against them by way of civil action pursuant to s 201(5) of the CMSA violates art 8 of the Federal Constitution?*

In view of the above, I also order that the proceeding at the sessions court be stayed pending the outcome of the Federal Court decision in this case.

This court feels that the order is wiseable, fair and suitable having regards to the applicable principles of laws and reasons forthwith. This court express his appreciation to the learned deputy public prosecutor and the learned counsel for their assistance in early disposal of the case.

Stay of sessions court proceeding ordered pending Federal Court decision.

Reported by Fatin Mohd Ismail